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AMERICAN SHORT LINE AND
REGIONAL RAILROAD ASSOCIATION
*The Voice of America's Independent Railroads*

**Alice C. Saylor**
**Vice President & General Counsel**



May 16, 2000
**Via Messenger**

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001



**Re: STB Ex Parte No. 582 (Sub-No. 1),**
**Major Rail Consolidation Procedures**

Dear Secretary Williams:

Attached for filing with the Surface Transportation Board are the original and 25 paper copies of the Comments of the American Short Line and Regional Railroad Association being submitted for filing in the above-captioned proceeding. A copy on diskette is also enclosed.

Please date-stamp the duplicate copy to indicate receipt and return it to the messenger. Thank you.

Sincerely,

Alice C. Saylor

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Before the
Surface Transportation Board
Washington, D.C.

original

STB Ex Parte No. 582 (Sub-No. 1),
Major Rail Consolidation Procedures



**COMMENTS OF THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**



The American Short Line and Regional Railroad Association (ASLRRA) is submitting these comments on behalf of its 418 short line and regional railroad members in response to the Advance Notice of Proposed Rulemaking (ANPRM) in the above-captioned proceeding (Decision served March 31, 2000). In that Decision, the Surface Transportation Board (STB or Board) invited comments from interested parties on modifications to its regulations at 49 CFR Part 1180 Subpart A governing proposals for major rail consolidations.

The American Short Line and Regional Railroad Association (ASLRRA) is a non-profit trade association incorporated in the District of Columbia. ASLRRA represents the interests of its short line and regional railroad members in legislative and regulatory matters. Short line and regional railroads are an important and growing component of the railroad industry. Today, they operate and maintain 29 percent of the American railroad industry's route mileage (approximately 50,000 miles of track), and account for 9 percent of the rail industry's freight revenue and 11 percent of railroad employment.

ASLRRA and its members are interested parties and submit these Comments to suggest changes to the Board's rules governing major rail acquisition transactions. The Board's rules applicable to railroad acquisition, control, merger, consolidation project, trackage rights, and lease procedures are found at 49 CFR Part 1180 Subpart A (49 CFR 1180.0-1180.9). Within the railroad acquisition rules, four types of transactions are defined. The first is *major*. A major transaction is defined as follows: "A *major* transaction is a control or merger involving two or more class I railroads." 49 CFR 1180.2(a). The ANPRM deals only with the railroad acquisition rules applicable to major (i.e. class I) acquisition transactions and those are the sole focus of ASLRRA's Comments.

Short line and regional railroads, and the shippers and communities that depend on them for service, are deeply affected by the ongoing restructuring of the North American railroad industry. Since the Staggers Act of 1980 transformed the regulatory landscape, the industry has been thoroughly changed by the sale of hundreds of light density branch lines to new operators and a continuing series of class I railroad mergers involving the retained high density main lines. As expressed in ASLRRA President Frank K. Turner's testimony before the Board on March 8, 2000 in the Ex Parte No. 582 public hearing: "In the rail industry, the big have gotten much bigger, while the small have grown greatly in number."[1]

The direction of these changes was clearly consistent with the intent of Congress when it enacted the Staggers Act in 1980. Back then, the industry was struggling to survive after years of stagnation under a heavy-handed regulatory regime. In the late 1970's, over a quarter of the track in the United States was being operated by railroad companies in bankruptcy. Clearly, radical restructuring was needed to increase efficiency, eliminate redundancy and trim excess capacity. That is exactly what happened. In the process, some lines with light traffic density were abandoned while others were sold. The class I railroads consolidated aggressively, to the point that only six large railroads remain in the U.S. and Canada today, down from more than 40 class I railroads in 1980. Gateways were closed, and many joint rates were cancelled in blanket fashion. These changes have led to increased efficiencies, but this progress has come at a price.

Today questions are being raised about whether the pendulum has swung too far. Many short line and regional railroads are concerned that competitive options within the railroad industry have become too restricted.[2] Many shippers share this concern. This is important because a fundamental premise of the Staggers Act was that for U.S. railroads, regulatory restrictions would be lessened or eliminated, but only where meaningful competition existed to discipline rates and service. A competitive transportation marketplace was viewed as a good substitute for regulation. This approach works only so long as that competitive transportation marketplace actually does exist and function. That transportation

[1]Mr. Turner's March 8, 2000 Statement is attached to these Comments and incorporated by reference.
[2] Some ASLRRA-member railroads are participating individually in this rulemaking proceeding. Others probably would have participated individually if they were not fearful of the reaction of their class I connection.

marketplace requires competitive options and alternative routes and meaningful choices between rate offerings and service providers. When the rail industry reaches the point that most shippers have only one choice of rail company to deal with, that fundamental premise of the Staggers Act no longer works. We are dangerously close to that point.

ASLRRA does not favor re-regulation. The railroad industry has "been there, and done that." History clarifies the very real danger attached to extensive government regulation of our business. We do not want to go back to the "bad old days." That is why it is critically important that competitive options be retained and strengthened.

The Board's rules regarding major railroad mergers are a good place to start. The Board's current rules were put in place by the Board's predecessor agency, the Interstate Commerce Commission (ICC) in 1982, following passage of the Staggers Act. Quite properly, considering the time of their adoption, the rules seem to lean in favor of rail consolidations. The "general policy statement for merger or control of at least two Class I railroads," begins:

> "The Surface Transportation Board encourages private industry initiative that leads to the rationalization of the nation's rail facilities and reduction of its excess capacity. One means of accomplishing these ends is rail consolidation." 49 CFR 1180.1 (a).

Later, the current rules discuss public interest considerations, and the balancing test that the Board performs to determine whether a transaction is in the public interest. The potential benefits are described:

> "Both the consolidated carrier and the public can benefit from a consolidation if the result is a financially sound competitor better able to provide adequate service on demand. This beneficial result can occur if the consolidated carrier is able to realize operating efficiencies and increased marketing opportunities. Since consolidations can lead to a reduction in redundant facilities and thereby to an increase in traffic density on underused lines, operating efficiencies may be realized. Furthermore, consolidations are the only feasible way for rail carriers to enter many new markets other than by contractual arrangement, such as for joint use of rail facilities or run-through trains. In some markets where there is sufficient existing rail capacity the construction of new rail line is prohibitively expensive and does not represent a feasible means of entry into the market." 49 CFR 1180.1 (c)(1).

The other half of the balancing test equation, the potential harm, is discussed next. The rules describe potential harm in two areas: reduction of competition and harm to essential services. 49 CFR 1180.1 (c)(2). In both, the rules reflect the Board's (and ICC's) approach of "protecting competition, not competitors."

> "...While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest...." 49 CFR 1180.1(c)(2)(i).

> "Consolidations often result in shifts of market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable impacts, the Board's concern is the preservation of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available." 49 CFR 1180.1(c)(2)(ii).

Finally, the rules discuss conditions. For major rail merger transactions, the statute gives the Board extensive authority to impose conditions, 49 USC 11324(c). The current rules state:

> "The Board has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation. However, the Board recognizes that conditions may lessen the benefits of a consolidation to both the carrier and the public. Therefore, the Board will not normally impose conditions on a consolidation to protect a carrier unless essential services are affected and the condition: (i) is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits...." 49 CFR 1180.1(d)

ASLRRA agrees with the Board's Decision, which states at page 3 that although the current merger regulations were a proper and reasoned response to the serious problems affecting railroads and their customers at that time, the goals of that merger policy have largely been achieved. Today the focus must be on improving service to customers. Rail infrastructure has been pared down to the point that some tracks and yards are congested and straining at capacity. Preserving viable options within the rail industry is imperative to enhance service, sustain competition, allow choices for shippers and avoid reregulation.

New STB class I merger rules can go a long way toward accomplishing this goal. ASLRRA recognizes that there are many different groups of stakeholders and diverse points of view that the Board must balance as it considers this important revision of its Class I merger rules. ASLRRA believes that its suggested changes (below) can be incorporated within the scope of the larger rule changes that the Board will consider. In ASLRRA's view, this will be consistent with the aims of this Ex Parte No. 582 (Sub-No. 1) rulemaking proceeding, and positive for the railroad industry as a whole. That is the spirit in which the following rule changes are suggested.

ASLRRA presented a "Short Line and Regional Railroad Bill of Rights" in Frank Turner's March 8, 2000 Statement (attached). As part of its review of the railroad acquisition rules applicable to major transactions, ASLRRA urges the Board to implement the Bill of Rights by including the following provisions relating to the concerns of small railroads within the new rules it adopts.

The general policy statement for merger or control of at least two class I railroads begins with a general statement at 49 CFR 1180.1(a). ASLRRA suggests that it be redrafted to include the following statement:

***49 CFR 1180.1(a)***

> ***"The Board places high priority on preserving and enhancing competition within the railroad industry. Small railroads play an important role in feeding traffic to the national rail network and providing service and competitive options for shippers. As the rail network nears capacity in some areas, small railroads can help bypass congested areas to keep freight moving. Small railroads offer capacity for future traffic growth. Their important role in the national rail network should be preserved and their procompetitive role ensured as part of any class I rail consolidation."***

In the discussion of public interest considerations for class I merger transactions at 49 CFR 1180.1(c), the following statement should be included:

***49 CFR 1180.1(c)***

> ***"In determining whether a transaction is in the public interest, the Board performs a balancing test. It weighs the potential benefits to applicants, the railroad network, shippers and the public against the potential harm to***

***the railroad network, shippers and the public. The Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the railroad network, shippers and the public; and will consider imposition of conditions to lessen such potential harm."***

In discussing the potential benefits to be considered at 49 CFR 1180.1(c)(1), the following language should be included:

***49 CFR 1180.1(c)(1)***

***"A consolidation will be considered to benefit the railroad network, shippers and the public only if applicants clearly demonstrate that competition will be enhanced and service will not suffer. Conditions will be imposed to ensure that competition is enhanced and to provide a remedy if service does suffer."***

In discussing the other half of the balancing test equation, the potential harm at 49 CFR 1180.1(c)(2) the following should be included:

***49 CFR 1180.1(c)(2)***

***"A consolidation would ill serve the public interest if the result would be harm to competition, restriction or elimination of competitive options within the rail network, or deterioration in service. The Board will impose conditions as necessary to preserve and enhance competition and enforce maintenance of service levels."***

The section discussing conditions at 49 CFR 1180.1(d) should specifically include the items of the "Short Line and Regional Railroad Bill of Rights."

***49 CFR 1180.1(d)***

***"The Board has broad authority to impose conditions on consolidations, including those that might be useful in preserving competitive options within the rail network that might be compromised or lessened by the consolidation, and ensuring that adequate service levels will be maintained. The Board recognizes that imposition of conditions may be essential in future consolidations in order to achieve these goals. In regard to ensuring the important role of small railroads within the rail network, the Board will impose the following four conditions unless the applicants demonstrate convincingly that imposition of one or more of these conditions would pose unreasonable operating or other problems for the consolidated carrier and would substantially frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. These conditions will be imposed in order to protect competition, not particular competitors. Therefore, in order to minimize unreasonable burdens on***

*small companies, the Board will impose these conditions presumptively, on its own motion. Class II and class III railroads will not be required to file individual responsive applications and will not be required to pay filing fees in connection with imposition of these conditions.*

*Conditions for the benefit of class II and class III railroads:*

*(1) Class II and class III railroads that connect to the consolidated carrier have the right to compensation by the consolidated carrier for service failures related to the consolidation. In addition, when the consolidated carrier cannot provide an acceptable level of service post-transaction, connecting class II and class III railroads should be allowed to perform additional services as necessary to provide acceptable service to shippers.*

*(2) Class II and class III railroads have the right to interchange and routing freedom. Contractual barriers affecting class II and class III railroads that connect with the consolidated carrier that prohibit or disadvantage full interchange rights, competitive routes and/or rates must be immediately removed by the consolidated carrier, and none imposed in the future. The consolidated carrier must maintain competitive joint rates through existing gateways. Also, class II and class III railroads should be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage. Any pricing or operational restrictions which disadvantage connecting class II or class III railroads must be immediately removed by the consolidated carrier, and none imposed in the future.*

*(3) Class II and class III railroads that connect to the consolidated carrier have the right to competitive and nondiscriminatory rates and pricing. Rates and pricing of the consolidated carrier that do not meet this standard will be promptly corrected by the consolidated carrier upon request by a connecting class II or class III railroad.*

*(4) Class II and class III railroads that connect to the consolidated carrier have the right to fair and nondiscriminatory car supply. Car supply issues regarding this standard will be promptly addressed by the consolidated carrier upon request by a connecting class II or class III railroad.*

*Implementation: The Board strongly encourages the consolidated carrier to work out any issues regarding these conditions with its connecting class II and class III carriers in a mutually agreeable fashion without resorting to the Board for interpretation or enforcement. However, if needed, the Board will put in place an expedited and cost-effective remedy process to be initiated by complaint filed with the Board by a connecting class II or class III carrier."*

The section of the current rules discussing supporting information to be provided by applicants, 49 CFR 1180.6, should have language added to specifically require that the application filed in a major transaction must include the following information:

***49 CFR 1180.6***

> ***"The effect of the proposed transaction upon class II and class III carriers that connect with applicants."***

The section of the current rules dealing with market analyses, 49 CFR 1180.7, requires applicants to prepare *impact analyses* in major transactions. This section should have language added to specifically require that the impact analyses prepared and filed by applicants in connection with a major transaction must include the following information:

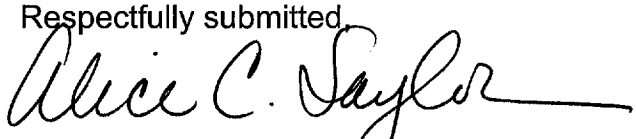
***49 CFR 1180.7***

> ***"An impact analysis must include the effect of the proposed transaction upon class II and class III carriers that connect with applicants."***

* * * * *

These rule changes, adopted by the Board as part of its revision of the class I merger rules, will be a giant step forward and will put the Board's rules in tune with today's railroading reality. The rail network must affirmatively preserve competitive options and ensure good service in order to remain viable. Small railroads will play an essential part if they are not prevented from doing so. Including the conditions enumerated in the "Short Line and Regional Railroad Bill of Rights" will put a stop to the erosion of competition and service caused by recent mergers. ASLRRA urges the Board to revise its rules to include the changes suggested above, and include the "Short Line and Regional Railroad Bill of Rights" as a condition of its approval of any future class I merger or consolidation transaction.

Respectfully submitted,



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Date: May 16, 2000

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2000, I have caused a copy of these Comments of the American Short Line and Regional Railroad Association in STB Ex Parte No. 582 (Sub-No. 1) to be served by first-class U.S. mail, postage prepaid, on every party of record on the service list for this proceeding.

Alice C. Saylor

Date: May 16, 2000

Before the
Surface Transportation Board
Washington, D.C.

**STB Ex Parte No. 582, Public Views on Major Rail Consolidations**

**STATEMENT OF FRANK K. TURNER, PRESIDENT**
**AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn, I am Frank Turner, President of the American Short Line and Regional Railroad Association ("ASLRRA"). In a Decision served January 24, 2000, the Surface Transportation Board ("Board") announced this public hearing to allow interested parties to express their views on the subject of major railroad consolidations, and the present and future shape of the North American railroad industry. ASLRRA and its 425 short line and regional railroad members have a critical interest in these subjects. We appreciate the opportunity for our views to be heard.

ASLRRA is a non-profit trade association that represents the interests of its more than 425 short line and regional railroad members in legislative and regulatory matters and industry affairs. ASLRRA was formed by the consolidation of the American Short Line Railroad Association with Regional Railroads of America effective January 1, 1998. Short line and regional railroads are an important and growing component of the railroad industry. Today, they operate and maintain 29 percent of the American railroad industry's route mileage, and account for 9 percent of the rail industry's freight revenue and 11 percent of railroad employment. Small railroads provide a vital link to shippers in many rural areas and play an essential role in the movement of many industrial and agricultural goods and commodities.

Short line and regional railroads, and the shippers and communities that depend on them for service, are deeply affected by the ongoing restructuring of the North American railroad industry. This extends to both the Class II and the Class III railroads, and I include both groups within the scope of my remarks.

The rail industry has been thoroughly transformed by the continuing series of Class I railroad mergers and the sale of hundreds of light density branch lines to new operators. This happened through incremental steps over the last twenty years which, taken together, have wrought remarkable changes. In the rail industry, the big have gotten much bigger, while the small have grown greatly in number. These changes have led to increased efficiencies, but this progress has come at a price.

As a group today, the small railroads are suffering from what I refer to as "merger fatigue." We have had to cope with continuous change in recent years as merger after merger has been implemented. The promised benefits and efficiencies have often been slow in coming or nonexistent, at least from our vantage point. Service failures have alienated some of our loyal shippers and wreaked havoc with our bottom lines. Personnel cuts that seem inevitably to come as the Class I's cut costs after a merger have put small railroads farther and farther away from Class I operating and marketing officials that they need to deal with on a day-to-day basis. Those Class I officials often seem stretched thin as they struggle to cope with expanded responsibilities.

These problems have led the Association to take a very serious and, frankly, rather skeptical look at whether further consolidations would be good or bad for the railroad industry and what the timing should be. In the past ASLRRA has remained neutral with regard to any particular Class I merger or acquisition transaction, because any particular transaction affects ASLRRA members differently depending on their situation. That has made it difficult for the Association to take an affirmative position, either pro or con. The small railroads as a group have basically left it to the Class I's and the Board to sort out their deals.

Today, however, many ASLRRA member railroads are deeply troubled by the prospect of another Class I merger. They have been badly hurt by past transactions, both by service problems related to implementation, and by post-transaction reduction in competitive options.

I am here today to articulate a set of conditions to protect the interests of small railroads while these Class I transactions take place. I agree with the Board's concern that the restructuring and realignment of the Class I's may not be over yet. Simply put, times have changed, and new rules are needed. With these protections which I will outline either voluntarily agreed to by the Class I parties or imposed by the Board as part of the merger approval process, the Association should be able to maintain its neutral stance, at least for the foreseeable future. If we cannot obtain these protections it is likely the Association will have to oppose future mergers.[1]

These new rules I am suggesting can be imposed by the Board as conditions in the context of its authority over future rail merger and consolidation transactions. They may also be appropriate for application to future negative impacts of recent merger and consolidation transactions that are still subject to Board oversight. These conditions are quite straightforward, few in number, easily understood, and utterly essential to protect the continued viability of small railroads as part of the interconnected rail network.

Together, they comprise what can be called a Short Line and Regional Railroad "Bill of Rights." I believe that these conditions should become an integral part of every Class I transaction approval process at the Board, present and future. Some or all of them may also be appropriate for application to recent transactions still subject to Board oversight. An expeditious enforcement/remedy process at the Board should be put in place to resolve disputes. The small railroads need this, and our national rail network deserves no less. These conditions will allow small railroads to remain viable competitors and feed traffic to the national system, whatever the future shape of the North American rail network turns out to be. This is important to the system as a whole. Today, small railroads originate more than a fifth of the carloads moved by the Class I's.

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[1] Looking down the road, I do not know what the Association's posture will be if we get to the point that there will just be two Class I rail systems left in North America. Although some have speculated that is where we are headed, I am not sure that is a good idea. It seems to me that the limited competitive options would be an invitation to reregulation, and I do not believe that would be in the best interests of the railroad industry.

Many of these conditions involve topics that are part of the Railroad Industry Agreement. This Agreement was signed in September of 1998. It resulted from private industry negotiations between representatives of the large and small railroads. The Agreement is limited in its application. Many of its most valuable commercial and competitive provisions apply only to traffic new to rail, and not to existing traffic. That was as far as the negotiations were able to go in 1998. However, despite some shortcomings, the Railroad Industry Agreement does provide a framework within which large and small railroads can deal with the some of their contentious issues.

So far, I would have to say that the results of the Agreement can best be described as very limited. It was certainly a positive thing for the industry to be able to successfully conclude such a negotiation and reach agreement outside of the regulatory process. However, I wish there were more clear successes under the Agreement to report to you today. Although the Agreement and what it stands for seem to be embraced at the Class I CEO level, it often seems to lose something in the translation on the way down to the troops that actually implement it.

I have recently suggested to the CEO's of all the major Class I railroads that we need to appoint representatives to sit down and initiate the next round of negotiations to try to strengthen the Railroad Industry Agreement. So far no talks have been scheduled. I hope this process can move forward. I urge the Board to repeat the approach that was so effective two years ago in Ex Parte No. 575: Require all the Class I's to sit down with small railroad representatives, with a tight time frame, to negotiate mutually agreeable solutions to the issues raised in this Statement and to report back to the Board by a specified date. These issues are: **Service, Interchange and Routing, Pricing, and Car Supply**. The Railroad Industry Agreement is a good idea, but it needs to be taken further and given more teeth. This framework should become the standard governing our future relationships with the large carriers.

The items included in the Short Line and Regional Railroad "Bill of Rights" would provide an excellent starting point for this next round of industry-wide negotiations.

I envision that we can fight on two fronts, or proceed on two parallel tracks if you prefer that metaphor. First, the Board can toughen the conditions required as part of the merger approval process for major transactions, with an expedited, complaint driven remedy process at the Board to enforce these conditions if necessary. At the same time, the industry can voluntarily discuss broadening the Railroad Industry Agreement to give the same principles a wider application outside the merger approval context. The result, I believe, will be a healthier and more competitive railroad industry.

## THE SHORT LINE AND REGIONAL RAILROAD "BILL OF RIGHTS"

### 1. Small Railroads Have the Right to Compensation for Service Failures

Service disruptions have become routine following major Class I transactions, and time after time small railroads have suffered. The record is dismal. In each of the last several mergers, many small railroads experienced severe revenue erosion due to the inability of their Class I connection to handle normal business levels. Shippers turn to trucks. Once they do, some of them never come back even after service improves.

Some service problems are clearly related to traffic growth, capacity constraints and inadequate infrastructure within the railroad industry. These problems are real, and underscore the critical need for major continuing capital investment by the railroad industry. Unfortunately, however, the service problems are also related to ineffective planning and poor execution of merger transactions. Time and again, claimed benefits have not materialized, while problems that were not supposed to occur have.

The difficulties small railroads face when service disruptions occur is often made worse by unavailability of Class I operating personnel. Personnel cuts in the name of efficiency seem inevitably to follow merger approval. The local Class I trainmaster is the first point of contact on operating issues for a small railroad. After a merger, the trainmaster typically ends up with a much larger territory to cover and is often located farther away. It is tough to address and resolve local problems under these conditions.

Before a merger takes place, connecting small railroads should be involved in the Class I's planning for implementation. The Class I's should be required to brief all connecting short lines and regionals. This dialogue at the local level could help avoid some of the service problems that have plagued recent mergers.

After a transaction is implemented, small railroads can be part of the solution if service problems occur. Indeed we have played that role in past mergers by rerouting trains, doing extra switching and blocking, etc. for our Class I partners. We are glad to do what we can to help. However, this should not include suffering revenue losses due to merger-related service failures over which we have no control.

From now on, **no Class I merger or acquisition transaction should be approved without iron-clad guarantees that short line and regional railroads will receive prompt compensating payment from the Class I to make up for revenue losses directly caused by service or local operating deficiencies resulting from the transaction. When a Class I cannot provide an acceptable level of service post-transaction, small railroads should be allowed to perform additional services as necessary to provide acceptable service to shippers.**

Shippers already have some rights to compensation when serious service problems occur. Small railroads should be provided a right to compensation, too. This can be put in place by agreement of the merging Class I parties if the Board makes it a condition of its merger approval.

## 2. Short Line and Regional Railroads Have a Right to Interchange and Routing Freedom

The competitive landscape has been radically altered as a result of the continuing series of Class I mergers and acquisitions. Many viable alternative routes have been eliminated, either by physical removal or economic disadvantage. This has

hampered the small railroads' efforts to hold onto existing business or attract new business to rail. This often creates "captive railroads."

Connectivity within the railroad industry has not been treated as a priority. Today's railroad industry, driven by Class I railroad policies and actions post-Staggers, has minimized rather than maximized rail routing options. These actions and policies may have yielded some short-term benefit to the Class I's for a while, although shippers and short lines have complained and protested but largely to no avail. Now, however, the industry is paying the price. The cumulative effect of the widespread elimination of routes through gateway closings, pricing policies, "de-marketing" of some business, and restrictions in line sale agreements through the 1980's and 90's have added up to the point that today there is often literally nowhere to go when rail lines become clogged.

I believe that the rail system must be truly interactive to function at peak efficiency. At junctions and terminal areas, small railroads should have the right to interchange with all Class I carriers as well as with each other without being disadvantaged in any way in terms of operations or pricing. Artificial "paper barriers" which arbitrarily restrict full interchange rights should be eliminated. Gateways, through routes and joint rates should be preserved as long as they are reasonably efficient, or allowed to be re-established if previously eliminated.

Up until now the Board and the ICC before it have chosen not to interfere with barriers to competition in line sales agreements. This may have been appropriate in the past when the primary goal was to encourage line sales as an alternative to abandonment. However, today the industry has changed so much that the focus should be more on fostering competition among the railroads as the number of Class I's continues to decline.

Some have argued that "paper barriers" were agreed to by the buyers as part of a negotiated contractual line sale agreement, and formed part of the basis for the sale price. That argument was valid. However, circumstances have changed substantially

since the mid-1980's and early 1990's when many of these line sales took place. First of all, considerable time has passed. The selling Class I has enjoyed the benefit of its bargain - - restricted competitive options for the spun-off line - - for quite a few years. Also, the world is very different. In essence, the deal has changed with the radically changing times. There are far fewer Class I railroads today. That has changed the competitive landscape to the point that artificial restrictions are no longer tolerable.

From now on, **no Class I merger or consolidation transaction should be approved without a requirement that all contractual barriers that prohibit or disadvantage full interchange rights, competitive routes and/or rates must be immediately removed, and none imposed in the future. Also, small railroads should be free to interchange with all other carriers in a terminal area without pricing or operational disadvantage.**

### 3. Short Line and Regional Railroads Have a Right to Competitive and Nondiscriminatory Pricing

This subject has several aspects. Class I carriers would be prohibited from practices which discriminate between their (Class I) customers and those located on connecting short lines. Pricing should be market based. Real capital and operating cost differences are valid, but Class I pricing should not disadvantage a customer located on a small railroad for that reason alone. Small railroads must be able to quote competitive rates for their shippers, and must not be artificially prevented from doing so.

The prohibition against discriminatory pricing which disadvantages a customer located on a small railroad has particular application in the case of some western grain rates. Rates for movement of grain can, and do, reflect efficiencies in train loading and movement. A series of discounts are often made available off the transportation rate for movement in unit trains or multi-car lots, rapid loading capability, etc. These discounts are proper and pro-competitive when they reflect actual savings and operating efficiencies to the Class I railroad. For instance, it is operationally simpler and there are

savings in terms of locomotives, crews, fuel, time and track capacity usage when a Class I railroad picks up an assembled unit train of grain to haul, compared to when it must perform multiple switches in order to assemble the train. It is one thing for the discounts to reflect actual savings and efficiencies. In my view, that is pro-competitive and proper. However, when the discounts are denied to a unit train assembled from multiple loading points on a small railroad, where the small railroad is willing to absorb the extra switching required to assemble the unit train, and that unit train is identical to the unit train loaded at a Class I loading point that gets the discounts, that is something else again. I call that discrimination, and I believe it is an anti-competitive practice.

After a merger or consolidation, the merging carriers should be required to quote through rates in conjunction with connecting railroads; or, alternatively, proportional rates on the Class I segment of a route that will enable the small railroad to quote a competitive rate for the entire movement. This will enhance competitive options.

The Board should expressly prohibit discrimination against customers located on small railroads as a condition of any Class I transaction, and provide a user-friendly remedy at the Board for small railroads with complaints.

From now on, **no Class I merger or acquisition transaction should be approved without an express requirement that rates and pricing for small railroads will be competitive and nondiscriminatory.**

## 4. Short Line and Regional Railroads Have a Right to Fair and Nondiscriminatory Car Supply

An adequate and suitable car supply is a fundamental requirement to do business as a railroad. Small railroads cannot succeed without fair access to needed equipment from their Class I partners.

Much of the freight originated or terminated on a small railroad spends the majority of its journey on a Class I railroads. The Class I typically receives a proportionately larger share of the freight revenue as well. Many small railroads own or lease a substantial amount of rail equipment to serve the needs of their shippers and protect their loadings. However, they must depend on their Class I connection(s) to do their share in supplying cars as well. This has always been true historically, and it remains the case today.

The movement of joint line freight requires cooperation between the rail partners. This includes cooperation in obtaining and supplying suitable equipment. This obligation extends to a willingness to agree to pay fair amounts of car hire, and a commitment to make equipment available for loading equitably, even in times of shortage. When equipment shortages occur, available cars should be furnished on a proportional basis among the Class I and short line shippers. The Class I should be liable for the small railroad's lost earnings when this standard is not met.

From now on, **no Class I merger or consolidation transaction should be approved without a requirement that connecting small railroads will be treated in a fair and nondiscriminatory fashion with regard to car supply and car compensation.**

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The railroad industry is in a period of continuing structural change. The resulting changed relationships and service disruptions have a serious impact on small railroads. Small railroads are an essential and valuable part of the national network. These small businesses need some fundamental assurances if they are to remain viable in the future.

I urge the Board to require these assurances from the Class I railroads involved in all major transactions that come before the Board for approval from this day forward. They could also be considered as a remedy for future negative impact from Class I

mergers that are still open for Board oversight. **The right to compensation for service failures - - The right to interchange and routing freedom - - The right to competitive and nondiscriminatory pricing - - The right to fair and nondiscriminatory car supply** - - These are the bare minimum required to give small railroads a fair chance to survive in the brave new world of Class I railroading. An expedited complaint driven remedy procedure at the Board should be available to sort out problems with implementation of these conditions.

These concepts all grow out of the Board's charge under the National Rail Transportation Policy to "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers... To foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes." The National Rail Transportation Policy envisions allowing competition to be the regulator wherever possible, and to minimize the need for Federal regulatory control. However, competition has become less effective in protecting small railroad interests as access to competing Class I railroads has been reduced.

I will commit, on behalf of the short line and regional railroads, to make every effort to move forward with another round of negotiations to deal with as many of these issues as possible in the context of the Railroad Industry Agreement and report back to the Board promptly. It would certainly help if the Board would give its encouragement to this process and set some firm deadlines. At the same time, I urge the Board to adopt the points of the "Short Line and Regional Railroad Bill of Rights" as a minimum requirement for conditions to be accepted as part of any Class I merger or consolidation transaction from this day forward.

Thank you.

Respectfully submitted,
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